Supreme Court, U.S.
FILED

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NO.

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IN THE
SUPREME COURT OF THE UNITED STATES

BRANDON HAYNES

Petitioners

VERSUS

BURL CAIN, WARDEN
LOUISIANA STATE PENITENTIARY

Respondents

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

Did trial counsel's guilt concessions on robbery, kidnaping, rape, and second degree murder charges, against the petitioner's directive expressed vigorously on the record, effectively constitute a forced guilty plea in violation of the petitioner's Sixth Amendment right to the assistance of counsel?

2.

Do these concessions likewise violate the petitioner's Fifth Amendment right against compulsory self-incrimination?

3.

Do these concessions constitute the kind of structural error this Court has held render a trial "inherently unfair" and thus are not be subject to a harmless error analysis?

4.

Does the decision of the Fifth Circuit conflict with other courts of appeal and state supreme courts and depart so far from the accepted course of judicial proceedings as to call for an exercise of this Court's supervisory power under Rule 10(a)?

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

MAY IT PLEASE THE COURT:

Petitioner, Brandon Haynes, respectfully prays that a Writ of Certiorari issue to review the *En Banc* Opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on July 12, 2002.

OPINION BELOW

The *En Banc* Opinion of the United States Court of Appeals for the Fifth Circuit, entered on July 12, 2002, is reprinted in the Appendix to this Petition at App. F.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its original Opinion (App. D) on November 27, 2001. Petition for rehearing *en banc* was granted on March 4, 2002. (App. E). The *en banc* Opinion (App. F) was entered on July 12, 2002.

This Court has jurisdiction to review the judgment of the United States Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments of the United States Constitution.

Fifth Amendment of the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment of the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The petitioner was charged with first degree murder, rape, robbery and kidnaping. The petitioner consistently maintained his innocence. His counsel, however, conceded to the jury his guilt to kidnaping, robbery, rape and second degree murder. The defendant stated on the record that he did not consent to his counsel's concession defense.

The district court, which had jurisdiction of this habeas corpus action under 28 U.S.C.§ 2241, held that counsel's concession without consent resulted in the constructive denial of counsel, causing *per se* prejudice under the standard set forth in *United States v. Cronic*, 466 U.S. 648 (1984), and vacated the petitioner's conviction. (App. B). The circuit court affirmed. *Haynes v. Cain*, 272 F.3d 757 (5th Cir. 2000)(App. D). On *en banc* review, however, the circuit court reversed the panel and the district court, finding that the concession was a strategic attempt to avoid death penalty, not a failure to subject prosecution's case to meaningful adversarial testing. 298 F.3d 375 (5th Cir. 2002)(*en banc*)(App. F).

STATEMENT OF FACTS

On October 20, 1994, petitioner's appointed counsel, in his opening statement, conceded the petitioner's guilt for a 1993 robbery, kidnaping, rape and second degree murder. Defense counsel only contested the state's evidence regarding the specific intent to kill necessary for a first degree murder conviction. Immediately following opening statements, the petitioner informed the Judge that he did not consent to these concessions, specifically stating the following:

> I don't agree with what these lawyers are doing, talking about I'm guilty of second degree murder.

> I'm not guilty of second degree or first degree. If that is the way they are going to represent me, they need to just jump over there with the D.A.'s. They ain't representing me. Telling the jurors that I'm guilty of second degree murder ain't trying to represent me in no kind of way. I disagree with what they are doing. ... I would rather it cost me my life than you all sell somebody out. ... I don't want them as my lawyers, Your Honor. ... I specifically asked my lawyers not to do what they – they said they were going to do this second degree junk. I don't like that. I mean, I'm not guilty. .. As far as them as a strategy trying to say I'm guilty of second so it will make them look good because I didn't get the death penalty or whatnot, that has no concern to me." (R. 609-612).

The Court informed Haynes that he had excellent attorneys, the trial continued, and Haynes was convicted of first degree murder and sentenced to life without parole.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT DECISION IS IN CLEAR CONFLICT WITH THOSE OF OTHER COURTS OF APPEAL AND STATE SUPREME COURTS

As will be discussed below the Fifth Circuit is in conflict with those of the Sixth, Ninth, Tenth, and Eleventh courts of appeal and the state supreme courts of Kansas, Florida, and North Carolina. This is the primary ground for granting the writ listed in Supreme Court Rule 10(a).

II. TRIAL COUNSEL'S GUILT CONCESSIONS ON ROBBERY, KIDNAPING, RAPE, AND SECOND DEGREE MURDER CHARGES, AGAINST THE PETITIONER'S DIRECTIVE EXPRESSED VIGOROUSLY ON THE RECORD, EFFECTIVELY CONSTITUTED A FORCED GUILTY PLEA IN VIOLATION OF THE PETITIONER'S SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL

In his opening statement, Brandon Haynes's defense counsel conceded that Haynes was guilty of robbery, kidnaping, rape and second degree murder. R. 603. Haynes, however, did not want to so concede and explained as much on the record. R. 609-12. Thus, "[t]rial counsel's concession as to Haynes' guilt on the second degree murder charge can only be described as the functional equivalent to a forced guilty plea over the objection of the defendant." *Haynes*, 298 F.3d at 386-87 (Parker, J. dissenting), *citing State v. Carter*, 270 Kan. 426, 14 P.3d 1138, 1148 (Kan.2000) (defense counsel's strategy of conceding felony murder in an attempt to prevent conviction of first degree murder even though the defendant maintained his innocence on all charged crimes was the functional equivalent to entering a guilty plea and violated both the Sixth Amendment and defendant's due process rights to a fair trial); *Nixon v. Singletary*, 758 So.2d 618, 625 (Fla.2000) (counsel's comments conceding defendant's guilt were the functional equivalent of a guilty plea); *State v. Harbison*, 337 S.E.2d 504, 507 (N.C. 1985) (admitting the defendant's guilt without first obtaining the client's consent, has the practical effect of a forced guilty plea; "the gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands"), *cert. denied*, 476 U.S. 1123 (1986).

"*Faretta v. California*, 422 U.S. 806 (1975) and *Brookhart v. Janis*, 384 U.S. 1 (1966) demonstrate that the

accused himself, not his appointed lawyer, has the authority to decide whether his lawyer should concede guilt to a lesser charge." *Haynes*, 298 F.3d at 384-85 (Parker, J. dissenting). "The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction." *Faretta*, 422 U.S. at 834. Determinative decisions, therefore, such as how to plead, whether to testify, or whether to concede, should remain the exclusive province of the defendant, no matter how ill-advised. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (finding that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.")(citations omitted).

Alternatively, and underlying the Sixth Amendment violation, Haynes's counsel's concession violated his Fifth Amendment right to be free from compulsory self-incrimination. *See Malloy v. Hogan*, 378 U.S. 1 (1964). Put simply, Brandon Haynes has the right not to be compelled to be a witness against himself; his right not to have his counsel be a witness against him must follow.

At the core of this consent issue is the defendant's right to determine his own destiny. "And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law." *Faretta*, 422 U.S. at 834 (internal quotations and citations omitted). "The Counsel Clause itself, which permits the accused 'to have the Assistance of Counsel for his defense,' implies a right in the defendant to conduct his own defense, with *assistance* at what, after all, is his, not counsel's trial." *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984) (emphasis in original).

Furthermore, Haynes's counsel's concession affected the entire framework of the trial, not merely the trial process. As such, his habeas review should not have been subject to a harmless error

analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991) (holding that structural errors render a trial "inherently unfair" and should not be subject to harmless error analysis); *Harris v. Warden, Louisiana State Penitentiary*, 152 F.3d 430, 435-36 (5th Cir. 1998)(finding that errors which affect the framework of the trial render the trial an unreliable mechanism for the determination of guilt beyond a reasonable doubt, and are not suitable for a harmless error analysis.). *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275 (1993) (the denial of the right to a jury verdict of guilt beyond reasonable doubt); *Waller v. Georgia*, 467 U.S. 39 (1984) (the denial of the right to a public trial); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (the denial of the right of self-representation at trial); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (the total deprivation of the right to counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (the presence of a biased judge).

Regarding concessions without consent, the Court of Appeals for the Sixth Circuit has held that:

> [A]n attorney may not stipulate to facts which amount to the 'functional equivalent' of a guilty plea.
>
> ...
>
> Unquestionably, the constitutional right of a criminal defendant to 'plead not guilty' ... entails the obligation of his attorney to structure the trial of the case around his client's plea .... In those rare cases where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in the manner consistent with *Boykin* [*v. Alabama*, 395 U.S. 238 (1969)]. *Wiley v. Sowders*, 647 F.2d 642, 649, 650 (6th Cir.), *cert. denied*, 454 U.S. 1091 (1981).

The Ninth, Tenth, and Eleventh Circuits agree. *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991); *Osborn v. Shillinger*, 861 F.2d 612 (10th Cir. 1988); *Francis v. Spraggins*, 720 F.2d 1190 (11th Cir. 1983), *cert. denied sub nom. Kemp v. Spraggins*, 470 U.S. 1059 (1985).

The Fifth Circuit, on the other hand, characterizes Haynes's counsel's concession as a strategic maneuver within the purview of trial counsel to limit penalty exposure. *Haynes*, 298 F.3d at 382. Any such "maneuver" nevertheless remains an effective forced plea. Had petitioner pleaded to second degree, his response to *Boykin's* coercion inquiry would have been in the affirmative and forestalled the Court's acceptance of the plea. Here, the petitioner was afforded no such protection.

CONCLUSION

To avoid the deterioration of the Sixth Amendment's right to the assistance of counsel and the Fifth Amendment's right against compulsory self-incrimination, and to resolve the conflict among the circuits, this Court should grant certiorari and clarify that a defendant has the right not to have his counsel concede his guilt without his consent. For these reasons, petitioner Brandon Haynes requests that a writ of certiorari issue.

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

BRANDON HAYNES	**CIVIL ACTION NO. 99-1257**
versus	
	JUDGE WALTER - SEC P
WARDEN, LOUISIANA STATE PENITENTIARY	**MAGISTRATE JUDGE PAYNE**

REPORT AND RECOMMENDATION
(Entered April 6, 2000)

Introduction and Summary

Brandon Haynes ("Petitioner") was convicted by a Caddo Parish jury of the first degree murder of Fang Yang. He avoided the death penalty when the jury deadlocked at the penalty phase. A mandatory sentence of life imprisonment was imposed. Petitioner seeks federal habeas relief on a single issue. He complains that his trial attorneys rendered ineffective assistance when they conceded in the opening statement, against the Petitioner's wishes, that Petitioner was guilty of acts that would constitute second degree murder. The attorneys

explained that they were forced to adopt that strategy because there was overwhelming evidence of guilt, and their denial of guilt during the first phase of the trial would cost them needed credibility if the case proceeded to the penalty phase. And if the attorneys were successful in getting a second degree murder conviction, the possibility of the death penalty would be avoided. The State contests the issue on the merits, admitting that Petitioner has exhausted his state court remedies.

For the reasons that follow, it is recommended that the petition be denied.

The Evidence Against Petitioner

Petitioner was represented by two experienced members of the Indigent Defender Office. The prosecution's evidence showed that Petitioner was employed on a crew involved in the construction of the Biomedical Research Center in Shreveport. After completing his day shift, going home and having dinner with friends, Petitioner returned to the building site. He encountered a worker who told him that he should not be there. Petitioner walked away but did not go home. Instead, he

abducted Fang Yang from the adjacent medical school building. Yang was a Chinese graduate student who had a reputation for hard work and long hours at the lab.

Petitioner took Yang to the roof of the 10-story Biomedical Research Center. He raped her, robbed her and cut her several times with a knife. The next morning, workers found Yang's body on the ground where she landed after plunging from the roof. The fall was the cause of Yang's death. The non-fatal knife wounds were in the nature of compliance wounds or torture wounds.

All of these facts were easily established by evidence such as (1) surveillance video that captured Petitioner's presence on the upper floors of the Biomedical Research Center, (2) surveillance video of Petitioner disconnecting some of the cameras, (3) DNA evidence of Petitioner's semen in Yang's vagina and rectum, (4) Yang's wallet and photo identification were found hidden in the wall of Petitioner's home within hours of the murder, (5) a knife was found in Petitioner's car, and (6) the coroner's expert testimony. There

was other evidence, but this list is sufficient to show that the defense team was facing a difficult case.

Opening Statements

First degree murder, which carries a potential death penalty, includes the killing of human being when the offender has specific intent to kill or inflict great bodily harm and he is engaged in the perpetration or attempted perpetration of certain enumerated felonies. La.R.S. 14:30. The prosecution's theory for a first degree murder conviction was that Petitioner had killed Yang intentionally while engaged in one or more of the enumerated felonies, which include second degree kidnapping, aggravated rape and armed robbery. The abundance of evidence against Petitioner was described in detail. (Tr. 588-602) The defense strategy was to avoid a first degree murder conviction and the possibility of the death penalty. The jury was asked to find that the evidence permitted a conviction only of the non-capital crime of second degree murder. Second degree murder includes (1) a killing committed when the offender has the specific intent to kill or inflict great bodily harm and (2) a

killing committed, even though the offender does not have the intent to kill or inflict great harm, if the offender is engaged in one of the enumerated felonies such as rape, robbery, and kidnapping. La.R.S. 14:30.1. The defense theory was that the facts that the prosecution could prove beyond a reasonable doubt permitted a conviction only under the second form of second degree murder.

Defense counsel began his opening statement by telling the jury that he wanted to be "up front" with the jury and was not going to come out of the blue later with a surprise defense. He stated that the defense was not going to contest that Petitioner raped Yang, kidnapped her or took her wallet. He also conceded that Yang died either during the commission of one of those felonies or just after, and the cause of her death was injuries sustained in the fall from the roof. He admitted that the evidence would show those facts, but then asked the jury to listen carefully for what the evidence would not show: specific intent to kill. (Tr. 602-04)

Defense counsel pointed out the State's burden of

proving each element: of the first-degree offense and that there was no hard evidence that Petitioner intended Yang's death. She admittedly went off the roof, but the immediate cause of her plunge was shown only by circumstantial evidence. He pointed out that it was reasonable to conclude from the circumstantial evidence that Yang's death was unintentional because (1) she accidentally fell during a struggle, (2) she stepped off the roof while attempting to flee her attacker, (3) she accidentally stepped off the roof after the attack because she could not see well without her glasses (which were missing), or (4) Yang committed suicide after the attack because of humiliation and dishonor. Counsel carefully explained his argument that the lack of direct evidence of intent to kill permitted a conviction for second degree murder, but not first degree murder. (Tr. 602-09)

Petitioner's Objection

At the conclusion of defense counsel's opening statement, Petitioner rose and addressed the court. After the jury was removed, he told the judge that he strenuously disagreed

with his attorney's statement that he was guilty of second degree murder. He maintained that he was not guilty of first or second degree murder. The two defense counsel, who each had at least ten years of experience and had tried a number of jury trials, stated their opinions that the defense offered was the only credible defense and that to employ an unbelievable defense at the guilt stage would seriously undermine their credibility at the penalty phase (if necessary).

Petitioner stated that, "I would rather it cost me my life than you all sell somebody out. You all ain't no lawyers." The court reassured Petitioner that he had excellent lawyers and that he was free to testify as he wished at the appropriate time. Petitioner replied, "So I can't say nothing about my lawyers. I'm just stuck with them even though they're getting up here doing this junk here?" The court stated that Petitioner's remarks were noted for the record, and the trial continued. (Tr. 609-14)

The Remainder of the Trial

As it turned out, the prosecution delivered all the evidence that it had promised. Petitioner elected not to testify.

(Tr.946-47) In closing arguments, the prosecutor again outlined the overwhelming evidence against Petitioner. (Tr. 950-62)

Defense counsel began his opening statement by reminding the jury that the defense team has been "up front" with the jurors from the beginning. He again conceded that the evidence proved a lot of things like rape, abduction and possibly robbery. He then concentrated on what the evidence did not prove.

> "The only issue we are contesting is whether or not Mr. Haynes intentionally killed the victim, Fang Yang. That is it. It is the only issue. ... I said there would be no evidence, no evidence, as to how she went off the roof. Without evidence as to how she went off, there is no evidence that he caused, much less intended, her death."

(Tr. 962-64) He again outlined the possibilities that Yang fell during a struggle, stepped off the roof accidentally, during flight or as the means of committing suicide. He carefully reviewed the evidence and pointed out the facts and omissions that supported his theory. (Tr. 964-75) Despite counsel's arguments, the jury found Petitioner guilty of first degree murder. As noted above, a mandatory life sentence was imposed because the jury

could not agree unanimously upon the death penalty.

The State Court Decision

This court's evaluation o a habeas claim must begin with the state court's decision. The last reasoned state court decision was that rendered by the state appellate court when Petitioner raised his ineffective assistance claim on direct appeal through a pro se brief. The court judged the claim under the rules set forth in Strickland v. Washington, 104 S.Ct. 2052 (1984). The court treated the issue as follows:

> Here counsel's strategy was to persuade the jury against a capital verdict in the bifurcated proceedings. The State did not rely on defense counsel's concessions. The State's evidence was legally sufficient to prove that Haynes was engaged in one or more of the enumerated felonies in the first degree murder statute. Based on the totality of the evidence, a reasonable juror could have concluded that Haynes had committed the aggravated kidnapping, rape, and armed robbery of Fang Yang. Because the evidence (the wallet, the rape and the DNA and blood evidence) proved that Haynes committed the underlying felonies, only one of which was necessary to convict, Haynes was not prejudiced by counsel's strategy to focus on the specific intent element and the requirement that specific intent be proved by what the circumstances indicated to the exclusion of other reasonable hypotheses of innocence. Haynes's counsel raised hypotheses that were arguably innocent, which

we have addressed.

> Whatever the reasons for the jury's inability to agree on a capital verdict, Haynes's counsel succeeded in avoiding the death sentence. We find no merit in Haynes's pro-se assignment.

State v. Haynes, 662 So.2d 849, 853 (La. App. 2d Cir. 1995), writ denied, 667 So.2d 1050 and 747 So.2d 11 (La.).

Standard of Review

Petitioner bears the burden of proving two components, deficient performance and prejudice, to establish ineffective assistance of counsel. Counsel's performance was deficient only if he made errors so serious that, when reviewed under an objective standard of reasonable professional assistance and afforded a presumption of competency, he was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland, 104 S.Ct. at 2064. Prejudice exists only if there is a reasonable probability that, but for the error, the result of the trial would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. Id. 104 S.Ct. at 2068.

A federal court may not grant habeas relief on a Strickland claim that was denied on the merits by the state court unless the state court's decision was an "unreasonable application" of Strickland. 28 U.S.C. §2254(d); Kitchens v. Johnson,190 F.3d 698, 701 (5th Cir. 1999). A state court's application of Strickland is unreasonable only if all reasonable jurists considering the question would be of one view that the state court ruling was incorrect. Id.

Analysis and Conclusion

A. Deficient Performance

After carefully reviewing the record, the court finds no plausible defense other than the one offered by counsel. The defense offered was not just the only defense available; it was a sound strategy given the facts of this case. There does not appear to be a Supreme Court decision which directly addresses when counsel may or may not concede guilt on an element or charge without being labeled ineffective. Most lower courts recognize that a concession (in whole or in part) of guilt, especially in capital cases, can be a sound tactical decision,

designed to bolster credibility for more plausible defenses or the penalty stage. See, e.g., Heath v. Jones, 941 F.2d 1126, 1139-40 (11th Cir. 1991) (admissions of guilt during guilt phase was reasonable strategy in light of overwhelming physical evidence and a confession); and Ramirez v. U.S., 17 F.Supp. 2d 63, 68 (D.R.I. 1998) (collecting cases in which concessions were deemed wise strategy), aff'd, 187 F.3d 622 (1st Cir. 1999). See also Clayton v. Gibson, 199 F.3d 1162, 1177-78 (10th Cir. 1999) (lack of vigorous defense at guilt stage in the face of overwhelming evidence against defendant was designed to maintain credibility at the penalty phase).

On the other hand, some courts have held that even where the evidence of guilt is overwhelming and the strategy appears entirely reasonable, counsel must have the consent of his client before he makes the concession. See Francis v. Spraggins, 720 F.2d 1190, 1194 (11th Cir. 1983), cert. denied, 105 S.Ct. 1776 (1985);[1] Magill v. Dugger, 824 F.2d 879,

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[1] Francis holds that: "Where a capital defendant, by his testimony as well as his plea, seeks a verdict of not guilty, counsel, though faced with strong evidence against his client,

883-888 (11th Cir. 1987) (counsel was at fault for conceding guilt throughout the trial and calling defendant to testify and admit guilt); U.S. v. Simone, 931 F.2d 1186, 1197 (7th Cir. 1991), cert. denied, 112 S.Ct. 584 (1991) ("We do not approve of a defense counsel's deliberate, explicit admission that a jury should find his client guilty of a charge in the absence of any suggestion that the defendant concurred in the decision to proceed in such a manner."); and Ramirez, 17 F.Supp.2d at 68 ("The failure to obtain a defendant's approval before conceding guilt on any charge, no matter how tactically sound the concession may have been, is not a practice that should be condoned.").

Petitioner in this case no only made clear that he did not agree with this strategy, but said: "I specifically asked my lawyers not to do what they - they said they were going to do

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may not concede the issue of guilt merely to avoid a somewhat hypocritical presentation during the sentencing phase and thereby maintain his credibility before the jury." This case does not fall squarely within that statement because Haynes did not testify at this trial.

this second degree junk. I don't like that. I mean, I'm not guilty. I don't feel I'm guilty of second degree or first degree and I don't agree with them." (Tr. 611) Accordingly, it is possible that Petitioner can prevail on the performance prong of the Strickland test even though the court finds absolutely no fault with the strategy employed by his counsel.[2] Petitioner is the master of his defense, especially when it comes to critical issues such a guilt or innocence of murder.

B. Prejudice

Even if Petitioner could prevail on the performance prong, he is riot entitled to relief on his ineffective assistance claim because he cannot show that any prejudice resulted from the concession of guilt to second degree murder. He was, after all, convicted beyond a reasonable doubt of the more serious crime of first degree murder. To show prejudice, Petitioner

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[2] The state court decision did not specifically address the performance prong of Strickland, choosing instead to reject the claim for lack of prejudice. Accordingly, the court makes no effort to determine whether the state court decision was an unreasonable application of the performance prong of Strickland.

must establish a reasonable probability that absent the concession of guilt, the result-of his trial would have been different. The court has no doubt that the verdict at the guilt stage would not have differed had the defense team elected a different strategy such as relying solely on the State's heavy burden of proof without articulating an alternative set of facts or legal theory. (Petitioner has never articulated any alternative defense.) On the other hand, had the defense team pursued a more aggressive but less credible defense, it may not have succeeded in avoiding the death penalty at the penalty phase.

Most courts that have addressed similar claims have reached the same result; no prejudice can be shown. Examples include Clayton, 199 F.3d at 1178 ("Even if Clayton could establish his trial counsel provided ineffective first phase assistance, the evidence of Clayton's guilt is overwhelming and precludes a finding of prejudice."); Heath, 941 F.2d at 1140 (same); Magill, 824 F.2d at 888 ("[s]ince counsel's performance, deficient though it was, does not undermine our confidence in the reliability of the guilt phase outcome, Magill's

conviction should stand."); and Ramirez, 17 F.Supp.2d at 69 (no prejudice shown because "[b]ased upon the evidence presented, it is inconceivable that a jury could have found him not guilty of those charges even if the [concessions] had not been made."). The same is true in this case. Petitioner has never articulated any factual basis upon which this court or the state court could base a finding of prejudice. The state court's decision, therefore, was not an unreasonable application of Strickland.

Accordingly;

IT IS RECOMMENDED that the petition for writ of habeas corpus be **DENIED** and that Petitioner's complaint be **DISMISSED WITH PREJUDICE.**

Objections

Under the provisions of 28 U.S.C. §636(b) (1) (C) and Fed.R.Civ. Proc. 72 (b), parties aggrieved by this recommendation have ten (10) business days from service of this report and recommendation to file specific, written objections with the Clerk of Court, unless an extension of time

is granted under Fed.R.Civ.P. 6(b). A party may respond to another party's objections within ten (10) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

A party's failure to file written objections to the proposed findings, conclusions and recommendation set forth above, within 10 days; after being served with a copy, shall bar that party, except upon. grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. See Douglass v. U.S.A.A., 79 F.3d 1415 (5th Cir. 1996) (en banc).

THUS DONE AND SIGNED at Shreveport, Louisiana, this the 6th day of April, 2000.

/s/ Roy S. Payne
ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

cc: RSP, J. Walter

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

BRANDON HAYNES **CIVIL ACTION NO. 99-1257**

versus

JUDGE WALTER - SEC P

BURL CAIN, WARDEN, LOUISIANA STATE PRISON **MAGISTRATE JUDGE PAYNE**

MEMORANDUM RULING

Before this Court is Brandon Haynes' Petition for Writ of Habeas Corpus. Haynes seeks federal habeas relief from his first degree murder conviction on grounds that his trial attorneys rendered ineffective assistance, or no assistance. On April 6, 2000, Magistrate Judge Payne issued a Report and Recommendation recommending that, under the ineffective assistance claim analysis enunciated in Strickland v. Washington, 466 U.S. 668,104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Haynes' petition be denied and dismissed with prejudice.

Haynes filed objections to the Report and Recommendation relying on United States v.Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), which was issued the same day as Strickland. In Cronic, the Supreme Court distinguished the rare case of constructive denial of counsel from the "merely incompetent" counsel, and held that, where constructive denial is present, prejudice is presumed. 466 U.S. at 658-59. In response to Haynes' objections, the State asserts that Strickland applies.

Therefore, the sole issue before this Court is whether the concession of partial guilt by a defendant's trial counsel, against the express desires of a defendant, constitutes the constructive denial of counsel as defined in Cronic, supra, or whether Strickland, supra, should be applied.

STATEMENT OF THE CASE

As stated above, Haynes was convicted by a Caddo Parish jury of the fist degree murder of a female graduate student. He avoided the death penalty when the jury deadlocked at penalty phase. A mandatory sentence of life imprisonment

was imposed. The magistrate judge's Report and Recommendation contains a detailed discussion of the record evidence and, this Court adopts by reference that discussion. However, due to the gravity of this Court's decision, certain facts are worthy of repetition.

In the case subjudice, the prosecution's theory for a first degree murder conviction was that Haynes had intentionally killed his victim while engaged in one or more of the felonies in La. R.S. 14:30[1], which include second degree kidnapping, aggravated rape and armed robbery. The defense strategy was to avoid a first degree murder conviction and the possibility of the death penalty, by asking the jury to find the evidence permitted a conviction only of the non-capital crime of second degree murder. That is, a killing committed, where the offender does not have the intent to kilt or inflict great harm, but the offender is engaged in one of the enumerated felonies such as

---

[1] First degree murder, which carries a potential death penalty, includes the killing of a human being when the offender has specific intent to kill or inflict great bodily harm and he is engaged in the perpetration or attempted perpetration of one or more enumerated felonies.

rape, robbery or kidnapping. La. R.S.14:30.1.

In his opening statement, defense counsel began by telling the jury that he wanted to be "up front" with them and would not come out later with a surprise defense. He stated that the defense was not going to contest that Haynes kidnapped, raped and sodomized the victim or that he took her wallet. Counsel also conceded that the victim died, either during the commission of one of those felonies or just after, and the cause of her death was injuries sustained in the fall from the roof. He admitted that the evidence would show those facts, but then asked the jury to listen carefully to what the evidence would not show: specific intent to kill. (Tr. 602-04).

At the conclusion of defense counsel's opening statement, Haynes rose and addressed the court. After the jury was removed, Haynes told the judge that he strenuously disagreed with his attorney's statement that he was guilty of the felonies charged. Haynes maintained that he was not guilty of first or second degree murder; that he had specifically instructed them not to make those admissions. The two defense counsel

explained that the defense offered was the only credible defense and that to employ an unbelievable defense at the guilt stage would seriously undermine their credibility at the penalty phase.

The court reassured Haynes that he had excellent lawyers and that he was free to testify as he wished at the appropriate time. The court stated that Haynes' remarks were noted for the record, and the trial continued. (Tr. 609-14). In closing arguments, defense counsel again conceded that the evidence proved a lot of crimes like rape, abduction and possibly robbery. He then reiterated that the evidence failed to prove Haynes had the specific intent to kill. Despite counsel's arguments, the jury found Haynes guilty of first degree murder.

LAW AND ANALYSIS

This Court agrees with the magistrate judge's conclusion that Haynes' defense counsel was not ineffective in asserting the second-degree murder defense. This Court would also agree that even had Haynes prevailed on the performance prong of Strickland, he cannot show prejudice from the concession of guilt to second degree murder. The facts as set out in the

Report and Recommendation are overwhelming. However, this Court finds that Strickland does not apply.

A thorough review of this case makes Cronic, supra, persuasive. Haynes asserts, and this Court agrees, that

> [i]t is . . . immaterial that his counsel's choice to, concede his guilt may have been prudent; it was not Haynes' choice. More to the point,. . . the moment his counsel conceded his guilt against his express wishes, Haynes' trial lost "its character as a confrontation between adversaries," and all semblance of principled constitutional adjudication was abandoned.

Petitioner's Reply to Response to Petitioner's Objections, p. 3, quoting Cronic, 466 U.S. at 656-57, 104 S.Ct. at 2045-46. This Court further agrees that "Haynes' defense counsel may have made appropriate strategic defense choices, but they did not work as the 'guiding hand' envisioned by the Fifth Circuit in Childress v. Johnson. [103 F.3d 1221, 1228 (5th Cir. 1997)] or the Supreme Court in Powell v. Alab [287 U.S. 45, 69, 53 S.Ct. 55, 67, 77 L.Ed. 158 (1932)]." Id., at 4.

Haynes' trial counsel acted against his express wishes. Haynes not only made clear that he did not agree with counsel's strategy, but said:

> I specifically asked my lawyers not to do what they - they said they were going to do this second degree junk. I don't like that. I mean, I'm not guilty. I don't feel I'm guilty of second degree or first degree and I don't agree with them.

(Tr. 611). In Cronic, the Court quoted Judge Wyzanski who wrote: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." Cronic, 466 U.S. at 657, 104 S.Ct. at 2046, citing United States ex rel. William v. Twomey 510 F.2d 634, 640 (CA7). In Cronic terms, admitting guilt, contrary to the express desires of the defendant, denies him the guarantees of the Sixth Amendment and sends the defendant not only unarmed, but hobbled. Id.

This Court finds that Haynes' trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. Haynes' Sixth Amendment rights have been effectively denied making the "adversary process itself presumptively unreliable." Cronic, 466 U.S. at 659, 104 S.Ct. at 2047. Therefore, under Cronic, supra, Haynes' trial counsel's

ineffectiveness is presumed without inquiry into counsel's actual performance at trial. Id. at 662,104 S.Ct. a 2048.

Accordingly, Brandon Haynes' Petition for Writ of Habeas Corpus is **GRANTED**.

/s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

COPY SENT:
DATE: 7/11/00
BY: CD
TO: Haynes
Walker
Estopinal
RSP
DEW

App. 26b

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

BRANDON HAYNES **CIVIL ACTION NO. 99-1257**

versus

JUDGE WALTER - SEC P

BURL CAIN, WARDEN, LOUISIANA STATE PRISON **MAGISTRATE JUDGE PAYNE**

JUDGMENT

For the reasons assigned in the foregoing Memorandum Ruling, **IT IS ORDERED** that the Petition for Writ of Habeas Corpus filed by Brandon Haynes ("Petitioner") be conditionally **GRANTED** by (1) vacating the conviction of Petitioner for first degree murder and (2) ordering that Petitioner be released from custody unless the State, within 180 days, commences prosecution of Petitioner arising from the facts that resulted in his initial conviction.

THUS DONE AND SIGNED, in Shreveport, Louisiana, this 7 day of July, 2000.

/s/ Donald E. Walter
DONALD E. WALTER

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

BRANDON HAYNES	**CIVIL ACTION NO. 99-1257**
versus	**JUDGE WALTER - SEC P**
BURL CAIN, WARDEN,	**MAGISTRATE JUDGE PAYNE**

NOTICE OF APPEAL

NOW INTO COURT through undersigned assistant district attorney, comes the State of Louisiana, in answer to petitioner's application for writ of habeas corpus filed herein, and respectfully represents:

Notice is hereby given that Burl Cain, Warden, and the State of Louisiana, defendants in the above named case, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 7th day of July, 2000.

BY: /s/ Catherine M. Estopinal
CATHERINE M. ESTOPINAL
LA. BAR ROLL NO. 05380
ASSISTANT DISTRICT ATTORNEY
501 CADDO PARISH COURTHOUSE
SHREVEPORT, LOUISIANA 71101
TELEPHONE: (318) 429-7618

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing Notice of Appeal has been mailed to H. Clay Walker, 1700 Irving Place, Shreveport, Louisiana 71101, counsel for Brandon Haynes, this 2nd day of August, 2000.

/s/ Catherine M. Estopinal
CATHERINE M. ESTOPINAL

APPENDIX D

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272 F.3d 757
(Cite as: 272 F.3d 757)

United States Court of Appeals,
Fifth Circuit.

Brandon HAYNES, Petitioner-Appellee,
v.
Burl CAIN, Warden, Louisiana State Penitentiary, Respondent-Appellant.

No. 00-31012.

Nov. 27, 2001.

Defendant convicted of felony murder petitioned for writ of habeas corpus. The United States District Court for the Western District of Louisiana, Donald E. Walter, J., granted writ, and government appealed. The Court of Appeals, Politz, Circuit Judge, held that defense counsel's opening argument strategy of explicitly conceding defendant's guilt on underlying felonies was ineffective assistance per se.

Affirmed.

Emilio M. Garza, Circuit Judge, dissented and filed opinion.

West Headnotes

[1] Habeas Corpus k450.1
197k450.1

Where claim has been reviewed on merits and denied by state court, federal court will grant habeas application only where state court's conclusions involved unreasonable application of clearly established federal law as determined by Supreme Court. 28 U.S.C.A. § 2254.

[2] Criminal Law k641.13(1)
110k641.13(1)

Although defendant claiming ineffective assistance of counsel generally must show that (1) performance of counsel was deficient, and (2) deficient performance resulted in prejudice to defendant, prejudice may be presumed in those rare circumstances where absence, actions, or

inactions of counsel compromised very reliability of trial process. U.S.C.A. Const.Amend. 6.

[3] Criminal Law k641.13(2.1)
110k641.13(2.1)

Defense counsel's opening argument strategy of explicitly conceding defendant's guilt on felonies underlying felony murder charge and claiming that only issue was whether murder was intended was ineffective assistance *per se*, regardless of any showing of prejudice, where defendant had maintained that he was innocent of all charges; counsel's trial strategy resulted in constructive denial of counsel. U.S.C.A. Const.Amend. 6.

***758** Henry Clay Walker (argued), Walker, Tooke & Lyons, Shreveport, LA, for Petitioner-Appellee.

Catherine M. Estopinal, Asst. Dist. Atty. (argued), Shreveport, LA, for Respondent-Appellant.

Appeal from the United States District Court for the Western District of Louisiana.

Before POLITZ and EMILIO M. GARZA, Circuit Judges, and KAZEN, [FN*] Chief District Judge.

FN* Chief District Judge of the Southern District of Texas, sitting by designation.

POLITZ, Circuit Judge:

Burl Cain, as warden of the Louisiana State Penitentiary appeals the district court's grant of a writ of habeas corpus to Brandon Haynes. For the reasons assigned we affirm.

BACKGROUND

Haynes was convicted of first degree murder for causing the death of a graduate medical student in 1993. The evidence adduced at trial disclosed that the victim had been last seen late at night working in a research laboratory. The next morning her body was found at the foot of an adjacent 10 story biomedical research building, then under construction. The medical examiner ruled that she died from injuries resulting from the fall. The autopsy disclosed that in addition to the death-dealing injuries the victim had several non-fatal cuts which the medical examiner believed

were likely intended to cause torture or compliance, some bruising around her arm, and semen residue in her vagina and rectum.

The evidence pointing to Haynes' involvement in the abduction and death of the student was substantial. Haynes was part of the construction crew working on the biomedical research building. Although he had gone home after completing his shift, eyewitness testimony established that he had returned to the building later that evening. Video surveillance cameras in the biomedical research building recorded ***759** him on the upper floors of the building and taped him climbing up to unplug the cameras. DNA analysis established that it was his semen found in the victim. The victim's wallet was found secreted in a wall in his home. A knife that could have caused the cuts on the victim was found in his car, as were blood stains matching the victim. Similar blood stains were found on his pants.

The State brought first degree murder charges against Haynes, contending that he abducted, raped, robbed, and tortured the victim before he either threw her or forced her off the roof. Haynes pleaded not guilty and consistently maintained his innocence. [FN1]

> FN1. Haynes did not deny that he was with the victim that evening or that they had sexual relations. Rather, he denies that the events transpired in the manner described by the prosecution.

Haynes was assigned two experienced public defenders. In their judgment the evidence against Haynes would result in his conviction. They decided that the best trial strategy would be to acknowledge that Haynes did abduct, rob, rape and torture the deceased student, but that the State could not prove that he caused or otherwise intended for her to fall from the building. Absent that element Haynes could only be found guilty of second degree felony murder and could not be given a death sentence.

In their opening statement counsel for Haynes stated:

> The evidence will show that the victim, Fang Yang, died during the commission of a felony. It will not show that Brandon Haynes specifically

intended to kill her. It will not show that he even caused her death. In essence, the evidence will show that Brandon Haynes is guilty of second degree murder. Nothing more. We are not going to say anything less, just that, second degree murder. We are not going to contest that Brandon Haynes raped the victim. It was a terrible thing he did, but he did it. We are not going to contest that. Likewise we are not going to contest the fact that he abducted her first and brought her up to the roof. We are not contesting that. We are not going to contest the fact that at some point he possibly robbed her.

Counsel then told the jury that the only issue in the case was whether Haynes intended to cause the woman's death, and that absent such proof they could not convict him of first degree murder. Counsel concluded by saying "[The evidence] is enough for second degree murder and that's what we are going to ask you to do at the end of the trial, come back with a verdict of second degree murder, no more, no less."

At the conclusion of defense counsel's opening statement Haynes told the trial judge that he wanted to address the court. The judge sent the jurors out, and Haynes' counsel stated that anything Haynes said was against the advice of counsel. Haynes then declared:

> I don't agree with what these lawyers are doing, talking about I'm guilty of second degree murder. I'm not guilty of second degree or first degree. If that is the way they are going to represent me, they need to just jump over there with the D.A.'s. They ain't representing me. Telling jurors that I'm guilty of second degree murder ain't trying to represent me in no kind of way. I disagree with what they are doing.

Haynes' counsel responded that in their judgment the evidence precluded hope of a not-guilty verdict and that this approach was in his best interest. Haynes told the ***760** judge that he had previously complained of their trial strategy and had requested that they not represent him. He repeated that request. He also stated "I specifically asked my lawyers not to do what they--they said they were going to do this second degree junk. I don't like that. I mean, I'm not guilty. I don't

feel I'm guilty of second degree or first degree and I don't agree with them."

The trial judge stated that Haynes was being represented by excellent lawyers and his request for different lawyers was denied. When Haynes protested that he was "stuck" with the appointed counsel and with their trial strategy, the judge stated that Haynes could testify at the appointed time if he desired to. He thereupon brought the jury back in and resumed the trial.

Haynes did not testify, and in closing argument Haynes' counsel returned to the strategy established in the opening statement, saying:

> In our opening, I said pay close attention not only to what all the evidence is going to show. I said there would be only one issue and only one issue; that is, intent to kill. Look at all the evidence.... It proves a lot of things. It proves a lot of things we didn't contest. It proves he intentionally raped her. It proves he intentionally cut her. Did I say otherwise? I conceded that. It proves that he abducted and possibly robbed her. He did take the wallet; we don't know when. We did not contest that. We did not cross examine any witness regarding the source of semen. The only issue we are contesting is whether or not Mr. Haynes intentionally killed the victim, Fang Yang. That is it. It is the only issue.

The jury found Haynes guilty of first degree murder but could not agree on the punishment, and under Louisiana law the trial judge sentenced Haynes to life without possibility of parole. Haynes filed a *pro se* brief in his direct appeal contending that his counsel had been ineffective by conceding his guilt on the underlying felonies. The state court of appeals affirmed his conviction. Haynes' counsel filed for writs of review in the Louisiana Supreme Court, which were denied; however, Haynes did not file any *pro se* brief in that effort and his ineffective assistance claim was not reviewed by that court.

Haynes then filed applications for post-conviction collateral relief in state court, again raising the ineffective assistance claim. Finding that the trial strategy employed by Haynes' counsel was a well-considered effort to avoid

a death sentence, the state court denied his application. After a premature federal application, Haynes sought a writ from the Louisiana Supreme Court which considered his ineffective assistance claim for the first time and denied same. Haynes then refiled in the court *a quo*.

The district court referred Haynes' writ application to a magistrate judge who filed a report recommending that it be denied. In his report the magistrate judge reviewed the state court opinions, which had examined Haynes' assertion using the two-pronged test established in *Strickland v. Washington* [FN2] for determining whether counsel was ineffective, and found that those opinions were not an unreasonable application of the *Strickland* standard. [FN3]

FN2. 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

FN3. Citing *Kitchens v. Johnson*, 190 F.3d 698 (5th Cir.1999).

The district court rejected the recommendation of the magistrate judge, finding that the state courts and the magistrate judge used the wrong standard in evaluating ***761** Haynes' claim. According to the district judge, the actions of Haynes' counsel in conceding partial guilt over Haynes' express objection resulted in the constructive denial of counsel, causing *per se* prejudice under the standard set forth in *U.S. v. Cronic*. [FN4] The district judge then granted Haynes a conditional writ of habeas corpus, stating that he is to be freed unless the State, within 180 days, initiates a new prosecution. That order was stayed pending the instant appeal.

FN4. 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (issued the same day as the *Strickland* opinion).

ANALYSIS

[1] We are presented with the typical question faced in considering an ineffective assistance claim, *i.e.*, whether the applicant must establish both prongs of the test set forth in *Strickland*, or whether the second "prejudice" prong is presumed under the exception set forth in *Cronic*. This is a mixed question of fact and law that we review *de*

novo. [FN5] Where, as here, the claim has been reviewed on the merits and denied by the state courts, we will grant the application only where "the state court's conclusions involved an unreasonable application of clearly established federal law as determined by the Supreme Court." [FN6]

FN5. *Childress v. Johnson,* 103 F.3d 1221 (5th Cir.1997).

FN6. *Jones v. Jones,* 163 F.3d 285, 299 (5th Cir.1998) (quoting *Nobles v. Johnson,* 127 F.3d 409, 418 (5th Cir.1997)).

[2] In *Strickland* the Supreme Court established the test that is generally to be applied in evaluating an ineffective assistance of counsel claim; namely, whether the applicant has established that (1) the performance of counsel was deficient, and (2) the deficient performance resulted in prejudice to the applicant. [FN7] In *Cronic,* however, the Court opined that there are some circumstances where the absence, actions, or inactions of counsel compromise the very reliability of the trial process.

In such circumstances prejudice to the applicant is presumed because the defendant's sixth amendment right to counsel is actually or constructively denied. [FN8] Since issuance of the *Strickland* and *Cronic* opinions we have had numerous opportunities to address their teachings and to seek to define their contours, and have reached the conclusion that the *Cronic* constructive denial exception is very narrow and is rarely applicable. [FN9]

FN7. *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052.

FN8. *Cronic,* 466 U.S. at 658-60, 104 S.Ct. 2039.

FN9. *See, e.g., Gochicoa v. Johnson,* 238 F.3d 278 (5th Cir.2000); *Jackson v. Johnson,* 150 F.3d 520 (5th Cir.1998); *and Childress,* 103 F.3d at 1229 ("The federal courts of appeal, including this one, have repeatedly emphasized that constructive denial of counsel as described in *Cronic* affords only a

narrow exception to the requirement that prejudice be proved.").

[3] The sixth amendment right to effective assistance of counsel derives from the defendant's fundamental right to a fair trial, [FN10] a goal best achieved by ensuring that the process involves vigorous partisan advocacy by both sides. [FN11] As the *Cronic* court pointed out, "[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of advocate.' The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible ***762** of meaningful adversarial testing." [FN12] The question before us is whether, by explicitly conceding his guilt on the underlying felonies from the beginning of the case, by not contesting the prosecution's evidence on those felonies, and by urging the jury to find him guilty of *nothing less* than second degree murder, counsel "fail[ed] to subject the prosecution's case to meaningful adversarial testing." [FN13]

FN10. *Strickland,* 466 U.S. at 684, 104 S.Ct. 2052. *See also Pratt v. Cain,* 142 F.3d 226 (5th Cir.1998).

FN11. *Cronic,* 466 U.S. at 655, 104 S.Ct. 2039 (quoting *Herring v. New York,* 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)).

FN12. *Id.* at 656, 104 S.Ct. 2039 (quoting *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)).

FN13. *Cronic,* 466 U.S. at 659, 104 S.Ct. 2039 (describing circumstances where the actions of defense counsel result in making the adversary process itself unreliable; thus, prejudice against the accused is presumed). In his briefs, many of which were filed *pro se* before appellate counsel was appointed for him, Haynes defines his claim primarily in terms of ineffective assistance of counsel. Our analysis, in turn, focuses on that issue

and we do not herein address the broader and equally serious sixth amendment concerns that the facts of this case raise, *e.g.*, whether, by conceding partial guilt over Haynes' direct objection, counsel usurped the fundamental right of how to plead that is reserved for the accused; or whether the trial judge, by not informing Haynes of his right to self-representation, violated his fundamental rights as enumerated in *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525 (1972).

Where counsel acknowledges, in closing argument, the overwhelming weight of evidence that has been admitted against his client, even conceding his client's guilt, we have found that such an acknowledgment of the obvious may be a trial tactic that does not reach the level of ineffective assistance. [FN14] We have also found that questions implicating participation in illegal activities during defense counsel's direct examination of his own client did not result in ineffective assistance. [FN15]

FN14. *United States v. Short,* 181 F.3d 620 (5th Cir.1999) (concurring with the trial court's assessment that counsel's statements in closing argument were reasonable in light of the overwhelming evidence of guilt adduced at trial). *See also Underwood v. Clark,* 939 F.2d 473, 474 (7th Cir.1991) ("Such acknowledgment can be a sound tactic when the evidence is indeed overwhelming (and there is no reason to suppose that any juror doubts this) and when the count in question is a lesser count, so that there is advantage to be gained by winning the confidence of the jury.").

FN15. *Pratt,* 142 F.3d at 231-32.

Several of our sister circuits have addressed cases where counsel for the defendant has conceded at least partial guilt in the opening statement or

closing argument, finding that such tactics do not result in *per se* prejudice. [FN16] In those cases, however, the accused had expressed prior agreement with the trial tactic of conceding guilt, especially to a lesser charge, or had already confessed guilt. The instant case presents no such agreement or confession. Indeed, despite the array of contrary evidence, Haynes maintains he is innocent, not only of the murder but of the underlying felonies as well, and he immediately and vigorously objected to the concessionary strategy employed by his counsel in the opening statement. The Kansas Supreme Court when faced with a case ***763** where the defendant vigorously objected to the court that he disagreed with his defense counsel's strategy of admitting guilt stated:

> Viewing [defense counsel's] conduct as part of a trial strategy or tactic is to ignore the obvious. By such conduct defense counsel was betraying the defendant by deliberately overriding his plea of not guilty. He not only denied [the defendant]

FN16. *See, e.g., Trice v. Ward,* 196 F.3d 1151 (10th Cir.1999) (no prejudice where counsel conceded guilt as to a rape charge accused had confessed to); *United States v. Wilks,* 46 F.3d 640 (7th Cir.1995) (concession of guilt in opening statement was not prejudicial where accused did not object and told court he was satisfied with the performance of his counsel); *McNeal v. Wainwright,* 722 F.2d 674 (11th Cir.1984) (no prejudice where the accused had confessed on tape and counsel conceded guilt). Several state cases reach the same result. *See, e.g., State v. McNeill,* 346 N.C. 233, 485 S.E.2d 284 (N.C.1997) (no prejudice when defense stipulated to stabbing and accused agreed to concession strategy) *and People v. Johnson,* 128 Ill.2d 253, 131 Ill.Dec. 562, 538 N.E.2d 1118 (1989) (no prejudice when counsel conceded guilt to a crime to which the accused had confessed).

> the right to conduct his defense, but, as in *Brookhart,* it was the equivalent to entering a plea of guilty.... [Defense counsel] had no right to conduct a defense premised on guilt over his client's objection. If [defense counsel] could not accept Carter's rejection of such a defense, then he should have either proceeded with a defense acceptable to Carter or sought permission to withdraw as defense counsel. [FN17]
>
> FN17. *Kansas v. Carter,* 270 Kan. 426, 14 P.3d 1138, 1148 (2000).

The impact upon the adversarial process of conceding guilt over the client's express objection was described by the Supreme Court of North Carolina in these terms:

> This Court is cognizant of situations where the evidence is so overwhelming that a plea of guilty is the best trial strategy. However, the gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands. When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury. [FN18]
>
> FN18. *State v. Harbison,* 315 N.C. 175, 337 S.E.2d 504, 507 (1985) (citing *Wiley v. Sowders,* 647 F.2d 642 (6th Cir.1981)). Two other jurisdictions have reached the same conclusion based on similar facts. *See Jones v. Nevada,* 110 Nev. 730, 877 P.2d 1052, 1057 (1994) (prejudice presumed where defense counsel improperly concedes his client's guilt) and State v. Anaya, 134 N.H. 346, 592 A.2d 1142, 1147 (1991) (requirement of prejudice not necessary where counsel over defendant's objection admitted to a lesser-included offense

and "prevented any meaningful adversarial testing of the prosecution's case.").

Here, the facts reflect defense counsels' considered decision to disregard Haynes' claim of innocence and to make no contest to any of the prosecution's case, other than the element of intent in the charge of first degree murder. In the opening statement co-counsel for Haynes expressly stated "the evidence will show that Brandon Haynes is guilty of second degree murder." He concluded by saying, as previously noted, that "[The evidence] is enough for second degree murder and that's what we are going to ask you to do at the end of the trial, come back with a verdict of second degree murder, no more, *no less*."

Counsel began by telling the jury, against Haynes' express objection and persistent assertion of innocence, that Haynes was guilty of all of the underlying felonies, each one particularly egregious, and was guilty of second degree murder. Counsel then advised the jury that the defense would not contest the prosecution's case on those felonies and, at the end of the trial, would ask that they convict Haynes of *nothing less* than second degree murder. We are not here presented with a case where counsel merely acknowledges what the evidence introduced already has established, or acknowledges up front some criminal activity that is not a fundamental part of the prosecution's primary charge. Rather, we have before us a case involving a conscious decision to acknowledge underlying ***764** felonies, felonies upon which the prosecution critically relied in asking the jury to make the inferences necessary to find Haynes guilty of first degree murder.

Further, counsel focused their questioning of the witnesses on the single issue they determined to challenge. As a result, although the prosecution did not rely on the concession to second degree murder, the evidence on Haynes' guilt as to those felonies went completely unchallenged. [FN19] Counsel for Haynes stated as much in closing, saying "Look at all the evidence.... It proves a lot of things. It proves a lot of things we didn't contest.... We did not cross examine any witness regarding the source of

semen. The only issue we are contesting is whether or not Mr. Haynes intentionally killed the victim, Fang Yang. That is it. It is the only issue."

FN19. The prosecution appropriately, and to its credit, noted repeatedly in its rebuttal argument that just because Haynes' counsel conceded his guilt to second degree murder did not make him guilty, it was the evidence they adduced at trial that proved his guilt. Such assertions do not and cannot alter the fact that the evidence went unchallenged when introduced. It is impossible to determine how the defense counsels' failure to aggressively contest the prosecution's evidence on those charges impacted the weight the jury accorded that evidence, or whether counsels' concession of guilt on those felonies facilitated the jury's decision to infer he also intended to kill the young lady.

As the record makes clear, counsel appointed to represent Haynes were experienced public defenders and trial lawyers. [FN20] Similarly, the record reflects that their decision to focus on avoiding a first degree murder conviction, with the concomitant possibility of a death sentence, was a considered one borne out of their experience. We are cognizant that defense counsel may choose this course of action because they perceive a need to maintain credibility with the jury in their effort to avoid a sentence of death, and out of a belief that the admissible evidence would lead to conviction on those charges in any event. The sixth amendment does not require counsel to invent a defense or act in an unethical manner. It does, however, require counsel to put the prosecution's case to the test through vigorous partisan advocacy. "[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond a reasonable doubt." [FN21]

FN20. In their

colloquy with the court, counsel represented that one had been practicing law for twelve years and the other for ten years, with each having participated in numerous trials.

FN21. *Cronic,* 466 U.S. at 656-57 n. 19, 104 S.Ct. 2039.

This is *not* a case of a defendant simply wanting to direct his defense; it is a case of a defendant staunchly maintaining his innocence to felonies that are the primary foundation of the prosecution's case, and from which spring the inferences necessary for the jury to find guilt of the greater charge. By asking the jury to find their client guilty of those felonies in their opening statement, counsel inappropriately lessened the prosecution's burden in leading the jury to make the inference he intentionally caused the victim's death. Absent the requisite partisan advocacy on such an integral aspect of the prosecution's case we cannot say that Haynes received the constitutionally mandated fair trial.

CONCLUSION

In summary, we find that the specific facts of this case resulted in a constructive denial of counsel, and the standard set forth in *Cronic* is the appropriate standard by which Haynes' application for a writ of habeas corpus must be analyzed. We ***765** therefore conclude that the district court was correct in its analysis.

Accordingly, the judgment appealed is AFFIRMED.

EMILIO M. GARZA, Circuit Judge, dissenting:

This case requires us to continue the process of delineating the appropriate boundaries between the Supreme Court's decisions in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The majority concludes that we should analyze Haynes' ineffective assistance of counsel claim under the standard set forth in *Cronic.* Under this standard, the defendant need not establish that his attorneys' conduct resulted in a prejudicial outcome. In reaching its

conclusion, the majority argues that the concession of certain elements of a crime is not a trial strategy, but rather the constructive denial of counsel.

The majority opinion confuses the denial of counsel, which falls within the province of the *Cronic* exception, with ineffective assistance of counsel, which we evaluate under *Strickland.* Here, the defense attorneys' concessions were an integral part of their strategy and never resulted in either the actual or constructive denial of representation as the majority contends. As such, the majority errs by applying the standard set forth in *Cronic* to the facts of this case.

In contrast to the majority, I find based on substantial authority that defense counsels' concession of a lesser included offense did not result in a failure to submit the prosecution's case to meaningful adversarial testing. Instead, it was a tactical decision, designed to provide Haynes with the best possible representation given the overwhelming evidence against him. Because defense counsel did not abandon their client by completely conceding his guilt, I would require Haynes to establish both defective assistance of counsel and prejudice under the two-part analysis of *Strickland.*

The test for determining ineffective assistance of counsel under *Strickland* requires, first, that the defendant establish that the counsel's performance was deficient. *See Andrews v. Collins,* 21 F.3d 612, 621 (5th Cir.1994). When assessing whether an attorney's performance was deficient, the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052.

If the defendant can overcome this burden, *Strickland* requires him or her to also establish that the deficient performance resulted in prejudice. *Id.* at 687, 104 S.Ct. 2052. The Supreme Court's decision in *Cronic* created a very limited exception to the application of *Strickland* 's two-part test for cases in which the defendant is denied completely the assistance of counsel. The Court held that prejudice will be presumed if the defendant

can show either that he or she (1) was actively "denied counsel at a critical stage of the trail" or (2) was constructively denied counsel because his attorney "entirely [failed] to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659, 104 S.Ct. 2039. While easily stated, the *Cronic* exception often has proven difficult to apply (or not to apply) given the myriad of factual circumstances surrounding ineffective assistance of counsel claims.

Previous circuit court decisions have addressed the issue of when an admission of guilt by the defense constitutes constructive denial of counsel. Collectively, these decisions have erected a clear framework for distinguishing between the constructive denial of counsel and tactical concessions ***766** made by defense counsel at trial. Constructive denial of counsel occurs in cases in which the attorney concedes the only factual issues in dispute. In such cases, courts have applied the *Cronic* exception, reasoning that the government has not been held to its burden of persuading the jury that the defendant was guilty of the charged crime. [FN1] When defense attorneys concede the only factual issues in dispute, they have ceased to represent their client. This constructive abandonment of their client produces the same types of structural defects, as well as the extreme risk of injustice, as the actual denial of counsel.

> FN1. *United States v. Swanson*, 943 F.2d 1070 (9th Cir.1991) ("A lawyer who informs the jury that it is his view of the evidence that there is no reasonable doubt regarding the only factual issues that are in dispute has utterly failed to subject the prosecution's case to meaningful adversarial testing."); *Wiley v. Sowders*, 647 F.2d 642, 650-51 (6th Cir.1981) (decided prior to *Cronic* and *Strickland*, but reaching a similar conclusion).

The second group of decisions addresses those situations in which defense counsel only admits the defendant's guilt for lesser included offenses in order to win credibility with the jury or highlight the lack of

evidence in other areas. In these examples, the circuit courts have found these partial concessions to be a tactical strategy and not a denial of the right to counsel.

Therefore, they have analyzed them under the two-part *Strickland* test. [FN2] These decisions reason that while attorneys may not completely surrender their client's case, they may make tactical concessions in order to best represent their client. In other words, admitting certain issues at trial, even without the client's consent, may result in ineffective assistance of counsel, but it is assistance nonetheless. While acknowledging the potential dangers posed by these admissions of guilt, the existing cases have, however, required the defendant to establish prejudice in cases where the defense attorney makes a decision to concede guilt for lesser offenses in order to obtain the favorable outcome on the principal charge. In doing so, they have recognized the fact that, in many instances, the evidence is so overwhelming that the most favorable result is not an acquittal, but a reduced sentence. If such concessions ultimately prove to be incorrect and prejudicial to their client, there is a remedy under the usual *Strickland* analysis for ineffective assistance.

FN2. *United States v. Short,* 181 F.3d 620, 624-5 (5th Cir.1999)(counsels statements, which did not admit guilt, but which implicated the defendant, were reasonable in light of the overwhelming evidence presented at trial); *Lingar v. Bowersox,* 176 F.3d 453, 458 (8th Cir.1999)("we conclude the decision to concede guilt of the lesser charge of second-degree murder was a reasonable tactical retreat rather than a complete surrender"); *Underwood v. Clark,* 939 F.2d 473, 474 (7th Cir.1991)(Posner, J.)(defense counsel's concession during closing arguments of a lesser included offense was "a sound tactic when the evidence is indeed overwhelming ... and when the count in question is a lesser count, so that there is an advantage to be

gained by winning the confidence of the jury."); *McNeal v. Wainwright,* 722 F.2d 674, 676 (11th Cir.1984)(McNeal's attorney's statements conceding manslaughter were tactical and did not constitute a forced plea).

The majority, in essence, maintains that this case is analogous to those decisions finding a constructive denial of counsel. Specifically, they find that defense counsel failed to challenge any element of the prosecution's case with the notable exception of the intent element of the first degree murder charge. Pursuant to their reasoning, the decision to concede second degree murder and to focus solely on the intent element resulted in Haynes essentially receiving no assistance from his counsel at trial.

This reasoning unnecessarily blurs the distinction between the constructive denial ***767** of counsel and ineffective assistance of counsel. If Haynes' attorneys had stated, against their client's wishes, that he had decided to plead guilty, that action would have amounted to a forced guilty plea. The prosecution's case would never be tested and Haynes would have been deprived of his presumption of innocence. This, however, is not what happened here. Haynes' attorneys never conceded that he was guilty of first degree murder. Rather, they acknowledged that the evidence on particular elements of the offense was overwhelming. Haynes' attorneys remained active at trial, probing weaknesses in the prosecution's case on the issue of intent. Ultimately, their strategy proved effective in avoiding the death penalty for their client.

In our decision in *Short,* we recognized the potential benefits of a concession strategy. We stated: "counsel took the reasonable strategic approach of trying to establish his credibility with the jury and enhance his chances that the jury would accept his arguments on the more serious counts." *Short,* 181 F.3d at 625. We should not turn an inquiry about the constructive denial of counsel into an evaluation of the defendant's trial strategy. Here, the defense adopted a strategy to admit a lesser included offense, but it was a defense nonetheless. The proper

inquiry is the effectiveness of such a tactic, and not its existence.

The majority attempts to distinguish those cases concluding that partial concessions of guilt are not denials of assistance of counsel by arguing first that the concessions in this case were made at a different stage of the proceedings. They also emphasize the fact that Haynes maintained his innocence throughout the trial whereas, in other cases, the defendant previously had confessed. Lastly, they focus on the fact that the defense adopted this strategy over the express objection of the defendant. These arguments basically amount to a claim that the decision to pursue a concession strategy in the instant case was more aggressive than in other cases. The distinctions relied upon by the majority, however, ignore the fundamental issue in this case. We must ultimately decide whether, by adopting such a strategy, Haynes' attorneys ceased to represent him at trial.

The majority makes much of the fact that defense counsel opted to concede Haynes' guilt in their opening statements and tailored their questioning of witnesses throughout trial to the lack of evidence on the intent issue. Again, I believe that the timing of admissions is a question of strategy properly evaluated under *Strickland.* Generally, the defense will wait until closing arguments to make any admissions. If, however, the defense counsel senses that there is an advantage to be gained, such as preempting the prosecution's case, by conceding certain factual elements at the outset of the trial, this does not suddenly transform a trial strategy into the constructive denial of counsel. The timing of the concessions, like the decision to make the admissions, itself, is a tactical choice. Choosing to employ a radical tactic in the opening arguments may be risky, but Haynes' attorneys could have reasonably concluded that this course would give their client the best opportunity to escape the death penalty. If, after reviewing the evidence, we found this decision to be overly aggressive and if we also concluded that, but for this decision, the outcome of the trial probably would have been different, only then should we grant Haynes a new trial.

The majority also focuses on

the fact that Haynes continues to maintain his innocence. Again, this conflates the constructive denial of counsel with ineffective assistance. A concession strategy is appropriate ***768** in cases where the overwhelming weight of evidence is against the defendant. This is the case whether the defendant has previously confessed to the crime or has steadfastly maintained his or her innocence. Haynes' attorneys had to consider the totality of the evidence, including their client's continuing declaration of innocence, in order to reach the decision to concede the lesser included offense of second-decree murder. What is crucial is that in making this strategic choice, they never ceased to represent Haynes. Rather, they pursued a strategy that was the most advantageous for their client given the circumstances. If the evidence presented at trial did not warrant the approach taken, the two-part *Strickland* analysis provides Haynes with a remedy for such ineffective assistance.

Moreover, by not requiring Haynes to show prejudice, the majority creates the potential for grossly inconsistent outcomes. In most instances, if the evidence establishing a lesser included offense was not overwhelming enough to warrant a concession, the defendant can easily establish that his counsel's performance was prejudicial. In cases such as this one, where the trial strategy probably benefitted the defendant by mitigating the substantial evidence arrayed against him, the defendant would have difficulty making the requisite showing under *Strickland*. If the majority's reasoning is employed, courts will likely find a defendant was denied counsel in cases where the defendant actually benefitted from a concession strategy.

The majority also focuses on the fact that Haynes withheld his consent to the defense strategy. Again, this begs the question of whether Haynes was denied counsel at trial. The lack of Haynes' consent to a particular strategy is simply not relevant to the issue of whether his attorneys abandoned him at trial. It is, however, important in ascertaining whether in representing him, Haynes' attorneys did so effectively. The majority again errs by equating issues that concern the effectiveness of counsel with the constructive denial of counsel. The decision to

pursue a trial strategy without Haynes' consent, like the decision to pursue the concession strategy, is appropriately evaluated under *Strickland.*

Applying the two-part *Strickland* test to the facts of this case, I find that Haynes' attorneys did not render ineffective assistance. The prosecution had both videotape of the defendant and eyewitness testimony placing Haynes at the crime scene. DNA analysis established that his semen was found in the victim. The police found a knife with the victim's blood on it. The police also located the victim's wallet in Haynes' home. Given the evidence, the strategy defense counsel adopted likely succeeded in obtaining the most favorable outcome for their client.

It is a plausible, however, that their failure to obtain Haynes' consent to the strategy could constitute deficient performance under *Strickland.* Even assuming, however, that proceeding with this line of defense without Haynes' consent constituted deficient performance, the result of the concession strategy was not prejudicial to the defendant per se. For Haynes to establish prejudice, he must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. Haynes has failed to establish that without the concession strategy, he would have been acquitted of first degree murder. Pervertedly, Haynes has succeeded in obtaining a new trial. In doing so, however, he has rejected the one strategy that saved his life. Today, he is one step closer to his executioner.

***769** For the foregoing reasons, I would REVERSE the judgment of the district court.

272 F.3d 757

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APPENDIX E
(page 50)

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284 F.3d 604
(Cite as: 284 F.3d 604)

United States Court of Appeals,
Fifth Circuit.

Brandon HAYNES,
Petitioner-Appellee,
v.
Burl CAIN, Warden,
Louisiana State Penitentiary,
Respondent-Appellant.

No. 00-31012.

March 4, 2002.

Henry Clay Walker (argued), Walker, Tooke & Lyons, Shreveport, LA, for Petitioner-Appellee.

***605** Catherine M. Estopinal, Asst. Dist. Atty. (argued), Shreveport, LA, for Respondent-Appellant.

Appeal from the United States District Court for the Western District of Louisiana; Donald E. Walter, Judge.

ON PETITION FOR REHEARING EN BANC

(Opinion Nov. 27, 2001, 5 Cir., 2001, 272 F.3d 757)

Before KING, Chief Judge, and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER, DENNIS and CLEMENT, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the petition for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

284 F.3d 604

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APPENDIX F

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298 F.3d 375
(Cite as: 298 F.3d 375)

United States Court of Appeals,
Fifth Circuit.

Brandon HAYNES, Petitioner-Appellee,
v.
Burl CAIN, Warden Louisiana State Penitentiary, Respondent-Appellant.

No. 00-31012.

July 12, 2002.

Following affirmance, 662 So.2d 849, of state conviction for first-degree murder, petition for federal habeas relief was brought alleging ineffective assistance of counsel. The United States District Court for the Western District of Louisiana, Donald E. Walter, J., granted petition, and government appealed. The Court of Appeals affirmed. On rehearing en banc, the Court of Appeals, Emilio M. Garza, Circuit Judge, held that: (1) District court should not have reviewed *de novo* state court's decision that defendant's counsel had not provided ineffective assistance; (2) opening-statement concession by defendant's attorney that defendant was guilty of second-degree murder was strategic attempt to avoid death penalty, not failure to subject prosecution's case to meaningful adversarial testing, and thus did not raise presumption of prejudice; and (3) failure to obtain defendant's consent before conceding to second-degree murder did not prejudice defendant.

Reversed.

Dennis, Circuit Judge, filed concurring opinion.

Robert M. Parker, Circuit Judge, filed dissenting opinion joined by Wiener and DeMoss, Circuit Judges.

West Headnotes

[1] Habeas Corpus k773
197k773

Federal district court should not have reviewed *de novo* state court's decision that defendant's counsel had not provided ineffective assistance by conceding guilt as to lesser offense of second-degree murder in order to avoid death penalty; proper review under Antiterrorism and Effective Death Penalty Act (AEDPA) was to defer to state habeas court's finding unless contrary to or an unreasonable application of clearly established United States Supreme Court precedent. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(1).

[2] Habeas Corpus k450.1
197k450.1

[2] Habeas Corpus k452
197k452

Federal habeas court may issue writ under "contrary to" clause of Antiterrorism and Effective Death Penalty Act (AEDPA) if state court applies rule different from governing law set forth in United States Supreme Court's cases, or if it decides case differently from how Supreme Court has done on set of materially indistinguishable facts; federal court may issue habeas writ under "unreasonable application" clause if state court correctly identifies governing legal principle from Supreme Court's decisions but unreasonably applies it to facts of particular case. 28 U.S.C.A. § 2254(d)(1).

[3] Criminal Law k641.12(1)
110k641.12(1)

[3] Criminal Law k641.13(1)
110k641.13(1)

Presumption of prejudice, obviating need to establish prejudice prong of ineffective assistance of counsel claim, is raised where: (1) defendant is denied counsel at critical stage of criminal proceeding; (2) defendant is represented by counsel at trial, but counsel entirely fails to subject prosecution's case to meaningful adversarial testing; or (3) circumstances surrounding trial prevent defendant's attorney from rendering effective assistance of counsel. U.S.C.A. Const.Amend. 6.

[4] Criminal Law k641.13(2.1)
110k641.13(2.1)

Opening-statement concession by attorney for first-degree murder defendant that defendant was guilty of

second-degree murder was strategic attempt to avoid death penalty rather than failure to subject prosecution's case to meaningful adversarial testing, and thus did not raise presumption of prejudice for purposes of defendant's subsequent ineffective assistance of counsel claim; concession did not apply to entire case and attorney concentrated on issue of intent throughout trial, and therefore ineffective assistance claim was analyzed under *Strickland* and required usual showing of prejudice. U.S.C.A. Const.Amend. 6.

[5] Criminal Law k641.13(1)
110k641.13(1)

In order for presumption of prejudice to apply in ineffective assistance of counsel claim by virtue of attorney's failure to subject prosecution's case to meaningful adversarial testing, attorney must completely fail to challenge prosecution's case, not just individual elements of it. U.S.C.A. Const.Amend. 6.

[6] Criminal Law k641.13(2.1)
110k641.13(2.1)

Defense counsel's failure at outset of first-degree murder trial to obtain defendant's consent before conceding in opening argument that defendant was guilty of second-degree murder, a strategic attempt to avoid death penalty, did not prejudice defendant, and thus could not amount to ineffective assistance, where prosecution possessed nearly conclusive evidence that defendant committed offense. U.S.C.A. Const.Amend. 6.

***376** Henry Clay Walker, IV (argued), Walker, Tooke & Lyons, Shreveport, LA, for Petitioner-Appellee.

Catherine M. Estopinal, Asst. Dist. Atty. (argued), Shreveport, LA, for Respondent-Appellant.

Appeal from the United States District Court for the Western District of Louisiana.

Before KING, Chief Judge, and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER, DENNIS and CLEMENT, Circuit Judges. [FN*]

FN* Because of his illness and subsequent

death, Judge Henry A. Politz, a member of the panel, did not participate in the en banc court.

EMILIO M. GARZA, Circuit Judge:

Burl Cain, the warden of the Louisiana State Penitentiary (the "Warden"), appeals the district court's grant of a writ of habeas corpus to Brandon Haynes pursuant to 28 U.S.C. § 2254 on his Sixth Amendment ineffective assistance of counsel claim. A panel of this court, analyzing Haynes' habeas petition under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. 104-132, 110 Stat. 1269, affirmed the district court's ruling. The panel majority held that Haynes' counsels' decision to concede guilt on the lesser-included offense of second degree murder in a capital murder case amounted to a constructive denial of counsel under *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). We granted rehearing en banc, thereby vacating the panel opinion. *See* Fifth Cir. R. 41.3.

Subsequently, the Supreme Court clarified the scope of the second *Cronic* exception to *Strickland* in *Bell v. Cone*, --- U.S. ***377** ----, ----, 122 S.Ct. 1843, 1850, 152 L.Ed.2d 914, ---- (2002). In *Bell*, the Court reaffirmed that *Cronic* applies in those cases in which defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." *Bell*, --- U.S. at ----, 122 S.Ct. at 1851 (quoting *Cronic*, 466 U.S. at 659, 104 S.Ct. 2039). More importantly, it clarified that an attorney's failure must be complete, noting that the difference between the situations addressed by *Strickland* and *Cronic* is "not of degree but of kind." *Id.* We now must determine whether the Louisiana state court's application of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) in this case was contrary to, or involved an unreasonable application of, clearly established federal law. In order to do so, we must decide whether Haynes' attorneys' decision to partially concede guilt resulted in a constructive denial of counsel under *Cronic*, or whether it was a valid trial strategy, which we review under the usual test for constitutionally adequate assistance of counsel articulated by the

Supreme Court in *Strickland.*

I

In October of 1993, Haynes was employed on a construction project at the Louisiana State University Biomedical Center in Shreveport, Louisiana. Around midnight on October 27, 1993, Haynes entered the LSU Medical Center, which was located next to the construction site. While walking through the Medical Center, Haynes encountered a female graduate student, Fang Yang, who was conducting research in one of the Medical Center's laboratories. Haynes forcibly took Yang to the roof of the building where he proceeded to rape and rob her. At some point during the rape and robbery, Yang either fell or was thrown off the roof of the ten-story building. Construction workers discovered her body the following morning. An autopsy revealed that Yang had died as a result of injuries from the fall. The autopsy also found several non-fatal cuts on Yang's body, which the medical examiner believed were compliance or torture wounds, as well as semen residue in Yang's vagina and rectum.

Police subsequently identified Haynes as a suspect based on video surveillance tapes showing Haynes on the upper floors of the Medical Center turning off other surveillance cameras on the night of the attack, as well as an eyewitness who confirmed that Haynes was in fact in the building on the night Yang was killed. Haynes was arrested and indicted for first degree murder.

The evidence establishing Haynes' involvement in the abduction and killing of Yang was substantial. In addition to the video surveillance tapes and an eyewitness placing Haynes in the Medical Center on the night of the crime, police found human blood in Haynes' car and on his pants. They also recovered Yang's wallet, which Haynes had hidden in the wall of his home. Moreover, DNA analysis established that it was Haynes' semen that was found in the victim.

At trial, the prosecution theorized that Haynes had intentionally killed Yang during the course of her rape and armed robbery. [FN1] Haynes' two attorneys' strategy aimed solely at avoiding a first degree murder

conviction and with it the possibility of the death penalty. Defense counsel ***378** conceded that the evidence established that Haynes kidnaped, raped, and robbed Yang, but argued that it did not establish that Haynes intentionally killed her. Thus, according to defense counsel, Haynes only could be convicted for second degree murder. [FN2]

> FN1. Under Louisiana law, first-degree murder requires proof of a "specific intent to kill or to inflict great bodily harm" during the course of an enumerated offense. *See* La. R.S. 14:30A(1). The enumerated offenses include second degree kidnaping, aggravated rape, and armed robbery.
>
> FN2. Under Louisiana law, second degree murder applies where a person dies during the course of an enumerated offense, but the defendant lacks the specific intent to kill the victim. *See* La. R.S. 14:30A(2).

Pursuant to this strategy, Haynes' counsel, during his opening statement, began by telling the jury that he would be "up front" with them. He conceded that Haynes kidnaped, raped, and robbed Yang and that the victim perished shortly after these offenses occurred. He then contrasted the overwhelming evidence establishing these facts with the paucity of evidence regarding Haynes' specific intent to kill Yang.

Following the defense's opening statement, Haynes addressed the court outside the presence of the jury. Haynes objected to his attorneys' concessions and stated that he was innocent. Haynes further stated that he specifically requested that his attorneys not make any concessions regarding his guilt for the commission of the offense. Haynes also asked the court to appoint new attorneys. The state trial court denied his request, assuring him that he had excellent lawyers and could testify if he wished.

The jury found Haynes guilty of first degree murder, but could not agree on an appropriate punishment. The trial court therefore sentenced Haynes to life imprisonment without the possibility of

parole. *See* La.Code Crim. P. art. 905.8. [FN3] The Louisiana appellate and supreme courts subsequently upheld Haynes' conviction on direct appeal.

> FN3. La.Code Crim. P. art. 905.8 provides:
> The court shall sentence the defendant in accordance with the determination of the jury. If the jury is unable to unanimously agree on a determination, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.
> La.Code Crim. P. art. 905.8.

Haynes then sought state post-conviction relief, alleging that he had received ineffective assistance of counsel at trial because of his counsels' unauthorized concessions of partial guilt. The Louisiana Court of Appeal, applying *Strickland,* denied relief upon finding that defense counsels' partial concessions were part of a valid trial strategy which succeeded in avoiding the death penalty. *See State v. Haynes,* 662 So.2d 849, 852-53 (La.Ct.App.1995). [FN4]

> FN4. Haynes did not initially seek relief in the Louisiana Supreme Court. The federal district court dismissed his initial § 2254 habeas petition without prejudice for failure to exhaust state law remedies on his ineffective assistance of counsel claim. The Louisiana Supreme Court denied Haynes' petition for a writ of certiorari and/or review. *In re Haynes,* 667 So.2d 1050 (La.1996). Haynes then filed the instant federal petition.

Haynes then filed a federal habeas petition, renewing his ineffective assistance of counsel claim. The district court granted Haynes' habeas petition, concluding that the state court had applied the incorrect legal standard in evaluating Haynes' claim. Specifically, the district court held that Haynes' attorneys' partial concession of guilt without Haynes' consent constituted a constructive denial of counsel. Relying on *Cronic,* the court held that

Haynes was not required to show that his attorneys' concessions actually prejudiced him, as required by *Strickland.* In reaching its decision, the district court did not discuss or ***379** apply AEDPA's deferential scheme. The panel majority affirmed the district court's decision.

II

The Warden maintains that the district court and the panel majority erred in granting federal habeas relief because the state habeas court's decision was not contrary to, or an unreasonable application of, clearly established federal law. In response, Haynes asserts that the state habeas court's decision was contrary to clearly established federal law because the state court applied the wrong legal standard. Specifically, Haynes maintains that the state court should have evaluated his ineffective assistance of counsel claim under *Cronic* instead of *Strickland.* Thus, according to Haynes, the district court properly granted habeas relief.

[1][2] Because Haynes filed his habeas petition on July 12, 1999, our review is governed by AEDPA. *See Lindh v. Murphy,* 521 U.S. 320, 326-27, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Under AEDPA, we must defer to the state habeas court unless its decision "was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). [FN5] Because the district court failed to conduct its review under AEDPA, instead applying the Supreme Court's precedent *de novo,* it violated AEDPA's dictate that federal district courts should defer to state habeas court decisions unless their adjudication is either "contrary to," or an "unreasonable application" of, clearly established Supreme Court precedent. [FN6] *Williams v. Taylor,* 529 U.S. 362, 404-405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The "contrary to" and the "unreasonable application" clauses in § 2254(d) have independent meaning. *Id.* A federal habeas court may issue a writ under the "contrary to" clause "if the state court applies a rule different from the governing law set forth in the [Supreme Court's] cases, or if it decides a case differently than [the Supreme Court] ha[s] done ***380** on a set of

materially indistinguishable facts." *Bell,* 122 S.Ct. at 1850. Under the "unreasonable application" clause, a federal habeas court may grant a habeas writ if "the state court correctly identifies the governing legal principle from [the Supreme Court's] decisions but unreasonably applies it to the facts of the particular case." *Id.*

FN5. 28 U.S.C. § 2254 provides:
(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;
28 U.S.C. § 2254(d)(1).

FN6. The dissent does likewise. It contends that this case is controlled by the Supreme Court's decision in *Faretta.* The dissent does not address or attempt to distinguish *Bell.* In fact, the dissent concedes that *Cronic* is inapplicable and Haynes' attorneys' conduct was not deficient under *Strickland.* The dissent finds a constitutional violation because Haynes' attorneys conceded a lesser included offense, but it ignores that basic distinction between conceding the only factual issues in dispute and acknowledging that the evidence establishing a lesser included offense is overwhelming that is at the core of the *Strickland / Cronic* distinction in this context. *Underwood v. Clark,* 939 F.2d 473, 474 (7th Cir.1991) (Posner, J.) (stating that "if his lawyer told the jury in closing argument, 'my client has decided to

> plead guilty,' that would be a forced plea ... it is otherwise if in closing argument counsel acknowledges what the course of the trial has made undeniable-that on a particular count the evidence of guilt is overwhelming"). Moreover, the dissent fails to accord the state habeas court's decision the proper AEDPA deference compelled by the dissent's concessions. AEDPA's deferential scheme is the touchstone for federal habeas review, giving "effect to state convictions to the extent possible under the law." *Williams,* 529 U.S. at 404. Circumventing this scheme and essentially retrying a state decision on federal habeas review is contrary to Congress's intent to limit the role of the federal courts in this area.

The Supreme Court in *Bell* analyzed a similar case under AEDPA's "contrary to" clause in which the petitioner argued that *Cronic* applied because defense counsel entirely failed to submit the prosecution's case to meaningful adversarial testing. *Id.* Ordinarily, to prevail on an ineffective assistance of counsel claim, a habeas petitioner must satisfy *Strickland*'s familiar two-part test. *Strickland,* 466 U.S. at 700, 104 S.Ct. 2052. First, "a defendant must demonstrate that 'counsel's representation fell below an objective standard of reasonableness,' with reasonableness being judged under professional norms prevailing at the time counsel rendered assistance." *Andrews v. Collins,* 21 F.3d 612, 621 (5th Cir.1994) (quoting *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052). When assessing whether an attorney's performance was deficient, the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052. Second, if counsel was deficient, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to

undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

[3] The Supreme Court's decision in *Cronic* created a very limited exception to the application of *Strickland* 's two-part test in situations that "are so likely to prejudice the accused that the cost of litigating their effect in the particular case is unjustified." *Cronic,* 466 U.S. at 658, 104 S.Ct. 2039. The Supreme Court has identified three situations implicating the right to counsel where the Court will presume that the petitioner has been prejudiced. *Bell,* --- U.S. ----, at ----, 122 S.Ct. 1843, 1850, 152 L.Ed.2d 914, at ----. First are situations in which a petitioner is denied counsel at a critical stage of a criminal proceeding. *Bell,* 122 S.Ct. at 1851 (quoting *Cronic,* 466 U.S. at 659, 104 S.Ct. 2039). Second, and most relevant here, are situations in which a petitioner is represented by counsel at trial, but his or her counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* Finally, prejudice is presumed when the circumstances surrounding a trial prevent a petitioner's attorney from rendering effective assistance of counsel. *Id.* (citing *Powell v. Alabama,* 287 U.S. 45, 57-58, 53 S.Ct. 55, 77 L.Ed. 158 (1932)).

[4][5] Haynes argues that the second exception applies in this instance and therefore he is relieved from establishing prejudice. Specifically, he contends that his counsel failed to subject the prosecution's case to meaningful adversarial testing on the individual elements constituting the lesser-included offense of second degree murder. In *Bell,* the Supreme Court clarified when an attorney's failure to subject the prosecution's case to meaningful adversarial testing results in a constructive denial of counsel. The Court, reiterating language in *Cronic,* stated that an attorney must "*entirely* fail[ ] to subject the prosecution's case to meaningful adversarial testing" for the presumption of prejudice to apply. *Bell,* 122 S.Ct. at 1851 (quoting *Cronic,* 466 U.S. at 659, 104 S.Ct. 2039) (emphasis in original). In other words, an attorney must completely fail to challenge ***381** the prosecution's case, not just individual elements of it. *Id.* Critically for purposes of this appeal, the Court further noted that when applying

Strickland or *Cronic*, the distinction between counsel's failure to oppose the prosecution entirely and the failure of counsel to do so at specific points during the trial is a "difference ... not of degree but of kind." *Id.* Under this rationale, when counsel fails to oppose the prosecution's case at specific points or concedes certain elements of a case to focus on others, he has made a tactical decision. *Id.* at 1851-52. By making such choices, defense counsel has not abandoned his or her client by entirely failing to challenge the prosecution's case. Such strategic decisions do not result in an abandonment of counsel, as when an attorney completely fails to challenge the prosecution's case. Under the Court's reasoning, then, *Cronic* is reserved only for those extreme cases in which counsel fails to present any defense. We presume prejudice in such cases because it is as if the defendant had no representation at all. In contrast, strategic or tactical decisions are evaluated under *Strickland* 's traditional two-pronged test for deficiency and prejudice.

Previous circuit court decisions have elaborated on this distinction between ineffective assistance of counsel and the constructive denial of counsel. Collectively, these decisions reinforce the notion that defense counsel must *entirely* fail to subject the prosecution's case to meaningful adversarial testing for the *Cronic* exception to apply. *Gochicoa v. Johnson*, 238 F.3d 278, 285 (5th Cir.2000) (holding that "[w]hen the defendant receives at least some meaningful assistance, he must prove prejudice in order to obtain relief for ineffective assistance of counsel" (quoting *Goodwin v. Johnson*, 132 F.3d 162, 176 n. 10 (5th Cir.1997))). Thus, when analyzing an attorney's decision regarding concession of guilt at trial, courts have found a constructive denial of counsel only in those instances where a defendant's attorney concedes the only factual issues in dispute. *See United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir.1991) (holding that "[a] lawyer who informs the jury that it is his view of the evidence that there is no reasonable doubt regarding the only factual issues that are in dispute has utterly failed to subject the prosecution's case to meaningful adversarial

testing"). In contrast, those courts that have confronted situations in which defense counsel concedes the defendant's guilt for only lesser-included offenses have consistently found these partial concessions to be tactical decisions, and not a denial of the right to counsel. [FN7] As such, they have analyzed them under the two-part *Strickland* test.

FN7. *See United States v. Short,* 181 F.3d 620, 624-5 (5th Cir.1999) (holding that counsel's statements, which did not admit guilt, but which implicated the defendant, were reasonable in light of the overwhelming evidence presented at trial); *Lingar v. Bowersox,* 176 F.3d 453, 458 (8th Cir.1999) (stating that "the decision to concede guilt of the lesser charge of second-degree murder was a reasonable tactical retreat rather than a complete surrender"); *Underwood v. Clark,* 939 F.2d at 474 (concluding that defense counsel's concession during closing arguments of a lesser included offense was "a sound tactic when the evidence is indeed overwhelming ... and when the count in question is a lesser count, so that there is an advantage to be gained by winning the confidence of the jury"); *McNeal v. Wainwright,* 722 F.2d 674, 676 (11th Cir.1984) (finding that McNeal's attorney's statements conceding manslaughter during a murder trial were tactical and strategic and did not constitute a forced guilty plea).

In the instant case, Haynes' defense counsel did not entirely fail to subject the prosecution's case to meaningful adversarial testing. Rather, Haynes' attorneys acknowledged that the prosecution's evidence establishing that Haynes raped and ***382** robbed Yang was overwhelming. After making this specific concession, however, Haynes' attorneys remained active at trial, probing weaknesses in the prosecution's case on the issue of intent. They cross-

examined state witnesses to emphasize that Yang wore thick glasses which were never located and that the victim landed face down when she fell, supporting their theory that she may have accidentally fallen when trying to flee from Haynes. They also elicited testimony that Yang's pants were only "slightly" pulled down in an attempt to show that she could have run off the roof under her own power. Defense counsel hoped that this strategy would de-emphasize the graphic nature of the crime and would focus the jury's attention on the one area where the prosecution's case was not exceedingly strong.

In sum, this is not a situation in which Haynes' attorneys abandoned their client. Instead, they continued to represent him throughout the course of the trial, adopting a strategy which in their judgment accorded Haynes the best opportunity for a favorable outcome. Ultimately, their strategy proved effective in avoiding the death penalty for their client. As the Supreme Court indicated in *Bell*, when defense counsel pursue a strategy, even if it involves conceding certain elements or remaining inactive at specific points during the trial, we will examine the effectiveness of their performance and the propriety of their decisions under *Strickland*. *Bell*, 122 S.Ct. at 1851-52. Thus, we hold that the Louisiana state court properly identified *Strickland* as the correct governing legal principle under which to evaluate Haynes' ineffective assistance of counsel claim. The state court's adjudication of Haynes' habeas petition, therefore, was not contrary to clearly established federal law.

III

[6] Having concluded that the state habeas court evaluated Haynes' claim under the correct legal standard, the sole remaining issue is whether the state court's adjudication of Haynes' claim under *Strickland* involved an "unreasonable application" of that standard to the facts of this case. Because we are reviewing this case under AEDPA's deferential scheme, Haynes must do more than merely show that the state habeas court incorrectly applied *Strickland* to this case. Rather, he must demonstrate that the Louisiana Court of Appeal applied *Strickland* in an

objectively unreasonable manner. *See* 28 U.S.C. § 2254(d)(1); *Williams,* 529 U.S. at 411, 120 S.Ct. 1495.

Haynes' counsel faced the demanding task of defending a client who was accused of committing a brutal and senseless crime. The prosecution had nearly conclusive proof that Haynes raped, robbed, and then murdered Yang. The prosecution had videotape of the defendant and eyewitness testimony both placing Haynes at the crime scene. DNA test results established that his semen was found in the victim. The police found a knife, which could have caused the cuts found on the victim, in Haynes' car. The police also located Yang's wallet in Haynes' home. Given the overwhelming evidence defense counsel faced, the Louisiana Court of Appeal was not unreasonable in concluding that the strategy ultimately adopted by Haynes' attorneys likely succeeded in obtaining the best possible outcome under the circumstances.

Nevertheless, it is plausible that the failure of Haynes' attorneys to obtain his consent might constitute deficient performance under *Strickland.* Even assuming, however, that Haynes has established deficient performance, he has failed to show prejudice. For Haynes to establish prejudice, he must "show that there is a reasonable ***383** probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. Based on the prosecution's nearly conclusive evidence that Haynes committed the offense in question, the Louisiana Court of Appeal properly concluded that Haynes had failed to establish that without the concession strategy, he would have been acquitted of first degree murder. Consequently, Haynes cannot show that the state habeas court's conclusion that he was not prejudiced by his attorneys' strategy was objectively unreasonable.

IV

We hold that the state court's decision applying *Strickland* to Haynes' ineffective assistance of counsel claim was not "contrary to" the governing law set forth by the Supreme Court for ineffective assistance of counsel cases. Moreover, we hold that the

state court did not unreasonably apply *Strickland* to the facts of this case. Based on the foregoing reasons, we REVERSE the district court's grant of a writ of habeas corpus to Haynes.

DENNIS, Circuit Judge, concurring:

In my judgment, the majority correctly concludes that Haynes's defense counsel did not "entirely fail[ ] to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic,* 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Defense counsel, in my opinion, subjected the prosecution's first degree murder case to meaningful adversarial testing by attempting to establish a defense of lack of intent through cross-examination and examination of witnesses and argument. Thus, the adversarial process protected by the Sixth Amendment, as described in *Cronic,* was preserved. The accused had "counsel acting in the role of an advocate." *Cronic,* 466 U.S. at 656, 104 S.Ct. 2039 (citation and footnote omitted). Defense counsel "require[d] the prosecution's case to survive the crucible of meaningful adversarial testing," *id.,* on the question of first or second degree murder and, more important, caused it to fail that testing on the question of a life or a death sentence. The constitutional guarantee was not violated here, because "the process [did not] lose[ ] its character as a confrontation between adversaries." [FN1] *Id.* at 656-57, 104 S.Ct. 2039.

FN1. As the Court in *Cronic* explained, Even if defense counsel may have made demonstrable errors, "[w]hen a true adversarial criminal trial has been conducted ... the kind of testing envisioned by the Sixth Amendment has occurred." 466 U.S. at 656, 104 S.Ct. 2039. "[T]he Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." *Id.* at 657 n. 19, 104 S.Ct. 2039.

I disagree, however, with the majority's perhaps unintentional implication that *Cronic* 's second "situation" of presumptive ineffectiveness applies only where the defense attorney completely fails to challenge the prosecution's case, that is, only when the attorney has totally abandoned his client, as if the defendant had no representation at all. Maj. Op. at 381. I believe the second *Cronic* exception applies, and prejudice is presumed, even when counsel makes some effort at a defense, if counsel makes no *meaningful* attempt to challenge the prosecution's case. For example, if the defense counsel represents his client at trial but, for no good reason, fails to cross-examine the only prosecution witness linking the defendant with the crime, he fails entirely to subject the prosecution's case ***384** to meaningful adversarial testing. [FN2] In my opinion, the broad and loose language in *Bell v. Cone,* --- U.S. ----, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002), was not intended to alter the meaning of *Cronic* 's second situation. In *Cone* the Court dealt with defense counsel's failure to affirmatively defend by not adducing sufficient available mitigating evidence; this was not a per se dereliction such as failure to subject the prosecution's case to meaningful adversarial testing. Moreover, we should keep in mind that the discussions of the per se prejudicial situations in both *Cronic* and *Cone* constituted dicta in those cases and were not intended as holdings or rigid rules absolutely governing future unforeseen cases.

FN2. As an example of the second situation, the *Cronic* Court drew an analogy to judicial denial of the right of cross-examination, which had been held to constitute a Sixth Amendment violation without any showing to prejudice in *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). See 3 Wayne R. LeFave, et al., *Criminal Procedure* § 11.7(d) n. 45 (2d ed.1999). "No specific showing of prejudice was required in [*Davis*] because the petitioner had been 'denied the right of effective cross-examination' which 'would be

> constitutional error of the first magnitude and no amount or want of prejudice would cure it.' " *Cronic,* 466 U.S. at 659, 104 S.Ct. 2039 (citing *Davis* at 318, 94 S.Ct. 1105).

On the other hand, I disagree with my dissenting colleagues, because I do not think that the defendant's Sixth Amendment claim of denial of the right of self-representation has been timely or properly raised. The right to self- representation announced in *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), is subject to several limitations. "As the *Faretta* opinion recognized, the right to self-representation is not absolute. The defendant must 'voluntarily and intelligently' elect to conduct his own defense, and most courts require him to do so in a timely manner." *Martinez v. Court of Appeal of California,* 528 U.S. 152, 161-162, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) (citations omitted). After objecting to his defense counsel's strategy at the early stage of the trial, Haynes did not assert his right to self-representation or clearly call for the discharge of his attorneys. Consequently, the trial judge did not inquire into the voluntariness or intelligence of such a nonexistent claim. Subsequently, Haynes continued to allow the defense counsel to represent him, and he elected not to testify at trial or to further protest the trial strategy pursued. Under these circumstances, Haynes either waived his self-representation claim or failed to properly raise and preserve it for our review. In either case, a reversal of his conviction on the theory that he has suffered a violation of his Sixth Amendment right to self-representation is unwarranted based on the record designated for our review.

ROBERT M. PARKER, Circuit Judge, joined by WIENER, and DeMOSS, Circuit Judges, dissenting from the en banc opinion:

The fundamental issue in this case is whether the Sixth Amendment and Due Process Clause of the Fourteenth Amendment give a defendant the right to require his appointed counsel to contest every charged crime when the defendant informs the judge and his appointed counsel that he is innocent and wants an "actual innocence"

defense. [FN1] *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) and *Brookhart v. Janis,* 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966) demonstrate ***385** that the accused himself, not his appointed lawyer, has the authority to decide whether his lawyer should concede guilt to a lesser charge. Because these two cases are clearly established law, the state court's application of the *Strickland* test misidentifies the correct governing legal principle, and is therefore "contrary to" clearly established federal law. I would therefore affirm the grant of the habeas writ.

> FN1. In using the term "actual innocence" defense, I mean a defense in which the defense attorney does not admit the defendant is guilty and holds the government to its burden of proof on each charged crime.

I. INITIAL OBSERVATIONS

My analysis of the trial court proceedings indicates the following. First, the evidence of Haynes' guilt is overwhelming. Second, Haynes' trial counsel were well-prepared and provided him with a professional defense. Third, trial counsel's decision to concede guilt on the lesser charge of second degree murder in the face of overwhelming evidence of guilt as to that charge was a successful approach to take in that it spared Haynes the death penalty. Fourth, the outcome of the case (conviction for first degree murder with a life sentence without possibility of parole) was a reliable one based on the overwhelming evidence of the defendant's guilt.

For these reasons, trial counsel's performance was not deficient under *Strickland's* first prong and Haynes was certainly not prejudiced by the trial counsel's approach under *Strickland* 's second prong. On the contrary, trial counsel's tactic was probably in Haynes' best interest. Thus, applying strictly a *Strickland* analysis, Haynes would not be entitled to habeas relief. [FN2] However, in my view, *Strickland* does not provide the appropriate framework for analyzing this case.

> FN2. Because trial counsel did contest the first degree

murder charge, the defendant was not completely denied assistance of counsel. Therefore, I agree with the majority that the *Cronic* exception is not applicable to this case. *See Bell,* --- U.S. ---- at ----, 122 S.Ct. 1843, 1850, 152 L.Ed.2d 914 at ---- ("When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete").

II. THE MAJORITY'S ERROR

The majority opinion rests on the incorrect assumption that defendant's Sixth Amendment claim is controlled by *Strickland.* It is not. This case raises a much broader concern that goes to the very core of what the Sixth Amendment means and asks us to address important questions involving due process and the right to a fair trial.

It is undisputed that Haynes' defense counsel conceded Haynes' guilt as to the second degree murder charge during opening statements. Subsequently, Haynes informed the trial judge that he wanted to address the court. The judge then sent the jurors out, and Haynes' counsel stated that anything Haynes said was against the advice of counsel. Haynes then unequivocally asserted:

> I don't agree with what these lawyers are doing, talking about I'm guilty of second degree murder. I'm not guilty of second degree or first degree. If that is the way they are going to represent me, they need to jump over there with the D.A.'s. They ain't representing me. Telling jurors that I'm guilty of second degree ain't trying to represent me in no kind of way. I disagree with what they are doing.

If Haynes' own words do not constitute an explicit plea of actual innocence, no words ever will. With all due respect to my learned colleagues in the majority, *Strickland* cannot possibly purport to control a situation in which defense counsel concedes the defendant's guilt as to second ***386** degree murder over the express objection of the defendant when the record clearly and unambiguously shows that

the defendant forcefully declared to the trial judge that he is innocent of all charged crimes and wants an "actual innocence" defense.

The Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend VI. In *Faretta*, the Supreme Court recognized, in the context of examining a defendant's right to self-representation, that an accused's right to defend himself against the government is a personal right. This personal right is predicated on respect for the individual's liberty to make his own choices as to his defense for it is the individual himself who must bear the consequences of those choices. *Faretta*, 422 U.S. at 834, 95 S.Ct. 2525.

Because the right to defend oneself is personal, trial counsel is only an "assistant" to the defendant and not the master of the defense. Consequently, the right to "assistance of counsel" necessarily entails that the defendant will be able to make certain fundamental decisions regarding his counsel's representation. One of those fundamental decisions must be whether to concede guilt as to a lesser charge. As Justice Brennan eloquently stated:

> *Faretta* establishes that the right to counsel is more than a right to have one's case presented competently and effectively. It is predicated on the view that the function of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial by assisting him in making choices that are his to make, not to make choices for him, although counsel may be better able to decide which tactics will be most effective for the defendant. *Jones v. Barnes*, 463 U.S. 745, 759, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (BRENNAN, J., dissenting).

Of course, a defendant's right to make certain decisions concerning his own defense must be balanced against the realities of a trial. Oftentimes, counsel will have to make quick decisions during a trial that impact the defendant. Defendants should not be entitled to prevail on ineffective assistance of counsel claims

merely because the defendant disagrees with minor tactical decisions made by his attorney. Admittedly, there may be some cases where the line between minor tactical decisions properly reserved to the attorney and fundamental decisions completely left to the defendant will be difficult to draw. This is not one of them.

The ultimate decision as to whether to plead guilty or not guilty is left to the defendant. *See Brookhart v. Janis,* 384 U.S. 1, 7, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966); *Jones v. Barnes,* 463 U.S. at 751, 103 S.Ct. 3308 (noting that the accused has the ultimate authority to decide whether to plead guilty). In the instant case, it is perfectly clear that (1) Haynes pleaded not guilty and consistently maintained his innocence; (2) Haynes communicated to both the trial judge and his lawyers that he was not guilty of any of the charged crimes and wanted his lawyers to represent him in a fashion that comported with his contention; (3) the lawyers refused to mount a defense which contested both second degree and first degree murder; (4) the trial judge told Haynes that he was stuck with appointed counsel and their trial strategy regardless of what he wanted; and (5) trial counsel conceded Haynes' guilt as to second degree murder throughout the trial.

Trial counsel's concession as to Haynes' guilt on the second degree murder charge can only be described as the functional equivalent to a forced guilty plea over the ***387** objection of the defendant. *See State v. Carter,* 270 Kan. 426, 14 P.3d 1138, 1148 (Kan.2000) (defense counsel's strategy of conceding felony murder in an attempt to prevent conviction of first degree murder even though the defendant maintained his innocence on all charged crimes was the functional equivalent to entering a guilty plea and violated both the Sixth Amendment and defendant's due process rights to a fair trial); *Nixon v. Singletary,* 758 So.2d 618, 625 (Fla.2000)(counsel's comments conceding defendant's guilt were the functional equivalent of a guilty plea). In my view, *Faretta, Brookhart* and *Jones* clearly establish that the Sixth Amendment is violated when counsel concedes the accused's guilt as to a lesser crime over the accused's express objection.

In short, Haynes had the

constitutional right to decide whether he wanted his counsel to concede guilt on a lesser charge. Haynes informed trial counsel that he wanted a defense that contested both second degree and first degree murder. They refused to provide such a defense. As I see it, trial counsel did not have the authority to make that decision.

Because Haynes' lawyers refused to provide the "actual innocence" defense demanded by their client, the trial judge should have appointed new counsel who would follow Haynes' decision to contest all criminal charges. The failure to do so violated Haynes' constitutional rights. The state court's determination that Haynes' constitutional rights were not violated was contrary to clearly established federal law, as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d)(1).

III. FINAL THOUGHTS

Trial counsel's decision to concede Haynes' guilt on the second degree murder charge was probably a wise move. However, this point is absolutely irrelevant to the issue before us. The Constitution mandates that the decision to concede guilt on a lesser charge must be made by the accused, not his attorney, regardless of how difficult it may be for the attorney to mount a defense on all charges. *See Nixon v. Singletary,* 758 So.2d 618, 625 (Fla.2000)("In every criminal case, a defense attorney can, at the very least, hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt"). No trial can be considered constitutionally fair when an attorney is given the authority to override the accused's wishes to concede nothing and hold the government to its burden of proof on each criminal charge.

I dissent.

298 F.3d 375

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